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IN THE

Supreme Court of the United States

October Term, 1965

No. ~~1946~~. 139

DELAWARE SPORTS SERVICE, a Delaware partnership comprised of Albert J. Tollin, Blanche C. Tollin, Shirley T. Ingram and Frances Freezman,

Petitioner,

v.

THE DIAMOND STATE TELEPHONE COMPANY

and

THE STATE OF DELAWARE,

Respondents.

BRIEF ON BEHALF OF RESPONDENT, THE DIAMOND STATE TELEPHONE COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 1318.

DELAWARE SPORTS SERVICE, A DELAWARE PARTNERSHIP COMPRISED OF ALBERT J. TOLLIN, BLANCHE C. TOLLIN, SHIRLEY T. INGRAM AND FRANCES FREEZMAN,
Petitioner,

v.

THE DIAMOND STATE TELEPHONE COMPANY

AND

THE STATE OF DELAWARE,
Respondents.

BRIEF ON BEHALF OF RESPONDENT, THE DIAMOND STATE TELEPHONE COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

CONSTITUTIONAL QUESTIONS INVOLVED.

In addition to the constitutional provisions cited in the petition, this case involves Article II, Section 17 of the Constitution of the State of Delaware, as follows:

> "Section 17. Lotteries. The sale of Lottery Tickets, pool selling and all other forms of gambling are prohibited in this State; except wagering or betting on races at race tracks by the use of pari-mutuel machines or totalizators in connection therewith.
>
> "The General Assembly shall enforce this Section by appropriate legislation."

STATUTES INVOLVED.

In addition to the statute cited in the petition, this case involves the following sections of the Delaware Code:

Title 11, Section 674:

"No person shall engage in the business of, or receive compensation in any form or measure for the dissemination of or receive information in furtherance of gambling or for gambling purposes by means of private wire or wires, or by means of a call service."

Title 11, Section 677:

"Sections 671-676 of this title shall be deemed an exercise of the police power of this State for the protection of the public welfare, health, peace, safety and morals of the people of this State, and all of the provisions of sections 671-676 of this title shall be liberally construed for the accomplishment of this purpose."

Title 26, Section 135:

The Commission may, after hearing, upon notice, by order in writing, require every utility to furnish, safe, adequate and proper service and keep and maintain its property and equipment in such condition as to enable it so to do."

COUNTERSTATEMENT OF THE CASE.

This respondent, The Diamond State Telephone Company (hereinafter "Diamond State"), believes that the petitioner's Statement of the Case should be explained and expanded in the following respects.[1]

Petitioner's business is not all in interstate commerce; some is intrastate.[2]

Petitioner filed an action in the Court of Chancery of the State of Delaware on October 22, 1959, seeking to enjoin Diamond State from terminating its service.[3] It was after the Chancery Court's opinion declining to exercise jurisdiction that petitioner initiated proceedings before the Delaware Public Service Commission on December 14, 1960.

The issues raised by the appeals in the Delaware courts and to this Court by petition for a writ of certiorari to the Supreme Court of Delaware included the issue of the effect of 18 U. S. C. A. § 1084 on those proceedings.[4]

Petitioner has stated in at least one context that it does not contend that 18 U. S. C. A. § 1084 ". . . confers exclusive jurisdiction on the Federal Courts."[5]

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1. Respondent's citations will be identical in form to those used by petitioner. Thus, "App. —" will be to the pages of the appendix to the petition, and "App. R. —" to the appendix record on appeal.
2. App. R. 68a.
3. App. R. 32a.
4. App. R. 90a.
5. App. R. 68a.

ARGUMENT.

I. There Are No Special or Important Reasons Why Certiorari Should Be Granted.

A. The Third Circuit Court of Appeals Did Not Render a Decision in Conflict With a Decision of Any Other Court of Appeals on the Same Matter.

Petitioner argues that the affirmance by the Court of Appeals of the District Court's decision in this case is in conflict with the decision of the Seventh Circuit Court of Appeals in *Kelly v. Illinois Bell Telephone Company,* 210 F. Supp. 456 (N. D. Ill., 1962), aff'd 325 F. 2d 148 (7 Cir., 1963). The decisions in these cases are entirely compatible because factually they are entirely different. In this case the District Court decided: (1) 18 U. S. C. A. § 1084(d) does not pre-empt state action in the field of termination of telephone service; (2) respondents were not acting pursuant to 18 U. S. C. A. § 1084(d) but pursuant to common law; (3) the state proceedings were res judicata as to the matters decided there.

In *Kelly* we have an entirely different situation. The United States Department of Justice acted specifically pursuant to 18 U. S. C. A. § 1084(d) and the Court of Appeals was concerned with whether or not any federal or state law had been violated. That decision has nothing to say about preemption or the termination of telephone facilities pursuant to well established common law procedure. The District Court here decided that Section 1084(d) has nothing to do with the case other than to allow by its very language proceedings of the type involved in the Delaware state courts. The Court of Appeals decision in *Kelly* was con-

cerned exclusively with Section 1084(d). Clearly, the two decisions have nothing in conflict.

B. The Third Circuit Court of Appeals Has Not Decided Any Question of Federal Law of Sufficient Importance to Be Decided by This Court.

1. The District Court Decided, and the Third Circuit Court of Appeals Affirmed, That 18 U. S. C. A. § 1084(d) Did Not Pre-Empt a State's Right to Regulate Public Utilities Operating Within Its Borders.

Diamond State has a duty to provide service to those in its territory who ask for such service. The Delaware Public Service Commission is given jurisdiction to enforce this duty by 26 Del. Code § 135:

> "The Commission may, after hearing, upon notice, by order in writing, require every utility to furnish safe, adequate and proper service. . . ."

The Constitution of the State of Delaware provides in Article II, Section 17:

> "Lotteries. The sale of Lottery Tickets, pool selling, and all other forms of gambling are prohibited in this State; except wagering or betting on races at race tracks by the use of pari-mutuel machines or totalizators in connection therewith.
>
> "The General Assembly shall enforce this Section by appropriate legislation."

The General Assembly has obeyed the constitutional mandate by enacting, *inter alia*, Title 11, Section 674 and 677:

> "No person shall engage in the business of, or receive compensation in any form or measure for, the

dissemination of or receive information in furtherance of gambling or for gambling purposes by means of private wire or wires or by means of a call service."

"Sections 671-676 of this title shall be deemed an exercise of the police power of this State for the protection of the public welfare, health, peace, safety and morals of the people of this State, and all of the provisions of sections 671-676 of this title shall be liberally construed for the accomplishment of this purpose."

Both the Delaware Public Service Commission and the Delaware Superior Court found that petitioner was using Diamond State's service to aid an illegal purpose.[6] The District Court decided that Diamond State had the right to terminate service under these circumstances, and that this right was based on well established common law principles.[7] The District Court then went on to decide that 18 U. S. C. A. § 1084(d) did not pre-empt this common law area but, on the contrary, was clearly intended to be an aid and supplement to such state procedures.[8]

Diamond State respectfully refers this Court to the decision of the District Court and to the language of Section 1084(d), and respectfully suggests that both establish dispositively and unambiguously that Section 1084(d) is in aid of, and most clearly does not pre-empt, such common law procedure. Especially compelling is the last sentence of Section 1084(d):

"Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored."

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6. App. 11a-12a.
7. App. 8a.
8. App. 9a.

This question was correctly decided by the District Court and affirmed by the Third Circuit Court of Appeals and is not of sufficient importance to be reconsidered by this Court.

2. The District Court Decided, and the Third Circuit Court of Appeals Affirmed, That the Decision of the Supreme Court of Delaware Was Res Judicata as to Matters Decided in the State Action.

The fallacy of petitioner's argument on this point is that it assumes that Section 1084(d) pre-empts any proceedings taken in the state tribunals. We have already noted that the District Court and the Court of Appeals have decided that Diamond State was entitled to and did rely on its common law right to discontinue its service where that service is being used to further illegal acts. The only question which might not have been decided in the state proceedings was whether Section 1084(d) pre-empted such common law proceedings. If that question was not res judicata, nevertheless the District Court did decide it in favor of respondents. The District Court stated that there was "some question as to whether plaintiff's arguments as to the effect of 18 USC 1084(d) were made in the state proceedings."[9] Presumably the District Court had in mind the statement by counsel for petitioner that these arguments were made in the Supreme Court of Delaware.[10]

In any event, there is no question here of the adjudicated status of questions arising under a federal statute enacted during the pendency of the state proceeding. The District Court specifically held that Section 1084(d) had nothing to do with the state proceedings. What is res judicata, as held by the District Court, is that petitioner is

9. App. 7a.

10. App. R. 90a.

not entitled to a protecive order because that identical issue between the identical parties—whether petitioner is entitled to a protective order enjoining Diamond State from exercising its common law right to discontinue service—was finally decided on the merits in the state court. *Grubb v. Public Utilities Commission of Ohio*, 281 U. S. 470 (1930).

As to petitioner's argument that it was forced into the state tribunal, Diamond State respectfully relies on the clear and realistic disposition of that argument by the District Court.[11]

There is no question to be decided by this Court as to whether or not issues arising under a federal statute enacted during pendency of the state proceeding are res judicata.

C. The Third Circuit Court of Appeals Has Not Decided a Federal Question in a Way in Conflict With Applicable Decisions of This Court.

The Court of Appeals, in affirming the District Court, relied on the case of *Grubb v. Public Utilities Commission of Ohio, supra.* To the extent that the decision of the District Court on the res judicata issue might be a decision of a federal question, such decision, as pointed out by the District Court,[12] is on all fours with the decision of this Court in the *Grubb* case. Petitioner states that the decisions of the Delaware courts "disclose no finding or adjudication as to the relevant federal question." The fact is that the *only* question which might not have been decided by the Delaware courts was that of pre-emption, and that question was correctly decided by the courts below.

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11. App. 4a-5a.
12. App. 5a-6a.

CONCLUSION.

No special or important reasons exist for this Court to grant the petition for a writ of certiorari to the Third Circuit Court of Appeals.

It is respectfully submitted that the petition be denied.

Respectfully submitted,

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Dated: June 14, 1966.